

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARY B. SMITH,
Plaintiff

vs.

DAVID C. NICHOLSON, TRUSTEE
OF THE D.J.J. REALTY TRUST,
DOMINIC M. SAWICKI,
TRUSTEE OF THE DOMINIC M.
SAWICKI NOMINEE TRUST,
AND CAROL ANN WHITNEY
AND GLENN WHITNEY,
Defendants

CIVIL ACTION NO.: 04 CV 10632 MEL

**DEFENDANTS, DAVID C. NICHOLSON, TRUSTEE OF THE D.J.J. REALTY TRUST,
DOMINIC M. SAWICKI, TRUSTEE OF THE DOMINIC M. SAWICKI NOMINEE
TRUST, CAROL ANN WHITNEY AND GLENN WHITNEY'S
JOINT MOTION FOR SUMMARY JUDGMENT**

EXHIBIT 1

1 Q. You don't remember. Do you remember
2 anything you told them?

3 A. They were firemen. They didn't bring
4 the ambulance down that road. Two men came. Two
5 firemen came down with a stretcher to where I was
6 and put me on the stretcher and carried me up
7 into the ambulance.

8 Q. Did you speak with them?

9 A. Of course. I don't remember what I
10 said, but we talked.

11 Q. And they took you to the Cape Cod
12 Hospital?

13 A. They did, yeah.

14 Q. Did you ever see the rock that you fell
15 on?

16 A. No. There were a lot of rocks, big
17 rocks.

18 Q. How do you know it was a rock that you
19 fell on?

20 A. How what?

21 Q. How do you know it was a rock that you
22 fell on?

23 A. Well, there were a lot of them and I
24 just skidded on one of them and fell.

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1 Q. Could you feel the rock under your feet?

2 A. Oh, yes. When I went down I knew what
3 had happened.

4 Q. Do you know if you told the ambulance
5 attendants that you fell on a rock?

6 A. I don't know whether I did or not.

7 Q. Did you tell them at the hospital?

8 A. Oh, yes. I told them at the hospital
9 what had happened, yes.

10 Q. Did you have any cuts?

11 A. No, I didn't, none at all.

12 Q. What about bruises?

13 A. Oh, I was black and blue really, my
14 whole side. My knee and my leg were black and
15 blue.

16 Q. Left side?

17 A. My whole side, all this.

18 Q. You're indicating the left side though?

19 A. The side that the knee was on that I --

20 Q. That's your left side?

21 A. That's my left side, yes.

22 Q. You just have to say that for the
23 record.

24 A. I'm sorry, Dear. I'm sorry. Yes, of

1 Q. Now you also stated that the April 2002
2 accident on Old Lantern Lane that that happened
3 about 2 p.m.?

4 A. I would think so, about that. In the
5 afternoon, early afternoon anyway.

6 Q. And you said it was a bright sunny day?

7 A. It was, like this.

8 Q. And you were able to see the roadway in
9 front of you as you were walking down it?

10 A. Oh, definitely. Yes.

11 Q. And you stated you noticed there were
12 some rocks?

13 A. A lot of rocks. Like a truck load of
14 rocks dumped in there that were washed out.

15 Q. So as you were walking from the car down
16 Old Lantern Lane when you first got out of the
17 car, can you tell me what type of road surface it
18 was?

19 A. Oh, it was asphalt two-thirds of the way
20 down, and then this washout had occurred and the
21 later part of it, the lower part of it, was
22 filled with rocks.

23 Q. Did you see any of those rocks on the
24 asphalt part of the lane?

1 A. No. No, because it was after. It
2 slanted like this and it was the lower third of
3 the road.

4 Q. And as you were walking down Old Lantern
5 Lane on the asphalt portion, were you able to see
6 the rocks in the washed out area up ahead of you?

7 A. To be perfect -- I wasn't paying much
8 attention to what was down there until I got to
9 it, and then when I got to it I thought I was
10 being very very careful about where I was putting
11 my feet so that nothing would happen, but it
12 didn't pan out that way.

13 Q. I don't know if this was asked or not,
14 but I'll ask it anyway. Were you using your cane
15 at the time of this fall?

16 A. No, no, no, no.

17 Q. Now in the area where the rocks were
18 which you said it was washed out, could you tell
19 me what type of road surface was that area?

20 A. Well, it was as I say it was macadam,
21 asphalt, two-thirds of the way down, and then in
22 this part it was washed out. There were spaces
23 of macadam still there and then there were rocks
24 to fill in the rest of the place. In order to

1 holding their small child?

2 A. They were. She was holding -- it was a
3 really small infant.

4 Q. So you would not have been holding the
5 child's hand?

6 A. Oh, no. Oh, I did when I first started
7 down that place I had to hold -- they had another
8 daughter Riley who was about maybe three and I
9 was holding her hand. When we first got out of
10 the car and then we crossed the street and then I
11 let go of her hand and went down the hill and she
12 went beside her mother.

13 Q. So the Seiths were they parked near you
14 when Miss Dayton parked the car?

15 A. I don't recall. They must have been
16 close by, but I don't recall where they were.

17 Q. Do you recall if you waited for them
18 before you crossed the road?

19 A. No, no. We crossed the road and we were
20 going down and suddenly they were behind me.

21 Q. Do you recall at which point in the road
22 specifically you were holding Riley's hand?

23 A. In the beginning at the top. I think I
24 may have let go because it was kind of steep and

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1 she was little and she was moving around and like
2 I said she was only three years old, so I let her
3 go her way. So they were at the top of the hill.

4 Q. And that's where it was still paved,
5 correct?

6 A. Yes, asphalt.

7 Q. Now I think you said that you proceeded
8 down the road for about two-thirds and it was
9 paved with asphalt; is that correct?

10 A. Yes.

11 Q. Do you recall if you saw any houses on
12 the left or the right side of the road?

13 A. No. It was all woods on both sides and
14 you couldn't even see the houses that were at the
15 end of the road because the trees were in their
16 way -- in the way.

17 Q. Do you recall how many houses were on
18 the street at that time?

19 A. That I didn't see a one. I was told
20 there were two there, but I didn't see a one.

21 Q. So to your knowledge you don't know if
22 there were any houses?

23 A. That's right.

24 Q. You never saw any houses?

1 A. There weren't any, no.

2 Q. It was just woods --

3 A. Woods.

4 Q. -- on either side of the road?

5 A. That's right.

6 Q. Then I believe you said you continued to
7 walk down the asphalt road and you got to an area
8 where it was no longer asphalt, it was patches of
9 rocks and asphalt; is that correct?

10 A. That's it exactly.

11 Q. It was obvious to you when that area
12 came about; is that correct?

13 A. Absolutely.

14 Q. It wasn't concealed, the rocks weren't
15 concealed in any way, they were out in the open?

16 A. Right.

17 Q. Now do you know who put those rocks
18 there?

19 A. No, I don't.

20 Q. And you don't know if Mr. Sawicki put
21 the rocks there?

22 A. I have no idea.

23 Q. At the time of the accident I think you
24 said you were walking in what you felt to be the

1 A. I wouldn't know.

2 Q. Now I think you've told us that there
3 were rocks and macadam in the road?

4 A. Big rocks, half the size of my fist.

5 Q. Now could you tell us about what size
6 that would be in inches?

7 A. Well, two to three inches --

8 Q. Two to three inches?

9 A. -- in diameter.

10 Q. And they would be round rocks?

11 A. Round and oral.

12 Q. Do you know what color they were?

13 A. Kind of buff colored like rocks.

14 Q. Nothing special about them?

15 A. No, not at all. Like a load of rocks
16 that had been dumped there.

17 Q. Did it look as though it was unnatural,
18 it seemed to you that somebody had put them there
19 and didn't seem part of the natural surface?

20 A. Yes, it wasn't part of the surface. I
21 mean it was interrupting the macadam, the
22 asphalt, because there was asphalt around it, you
23 know.

24 Q. But you don't know who put the rocks

1 there?

2 A. No, I don't.

3 Q. I think you also said that after you had
4 fallen you were just after the asphalt or that
5 you were halfway on the asphalt; is that correct?

6 A. I was just stepping off the asphalt.
7 Yes, that I remember.

8 Q. Do you recall when you fell it was as
9 you were going on the asphalt or how could you
10 differentiate between falling on the rock and
11 falling on the asphalt?

12 A. I fell -- my feet were on the rocks, but
13 I sat down on the asphalt because I was right at
14 the edge of the rocks and the asphalt, and also
15 my feet -- I landed with my legs and feet on the
16 rocks and the rest of me on the asphalt.

17 Q. Could you tell me approximately how many
18 inches or feet your feet were on the rocks from
19 the end of the asphalt?

20 A. From my knees, from my knees.

21 Q. So from the length of your knee to your
22 foot?

23 A. That's right. That's right.

24 Q. Have you ever spoken with Mr. Sawicki?